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No. 20

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

W.M.C.A., INC., *et al.*, Appellants,

v.

CAROLINE K. SIMON, *et al.*, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR LEONARD BERMAN, APPELLEE

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Statement

Appellee, Leonard Berman, Chairman, Board of Supervisors, Westchester County, asks leave that the respective statements, summary, arguments, points, authorities and citations set forth in the brief submitted herein by the appellees, Caroline K. Simon, Secretary of State of the State of New York, and Louis J. Lefkowitz, Attorney General of the State of New York, be considered as though the same were recited herein in full, and that the same be treated and considered by this Court as the said appellee's position and argument on this appeal.

Argument

Much has been written and said concerning the apportionment of state legislatures.[1] We believe that the views expressed by Congressman L. H. Fountain on this subject are worthy of repetition here.[2]

> "I do not believe that the Fourteenth Amendment requires the apportionment of both Houses of a State legislature on a strict population basis. Moreover, a rigid interpretation of this kind would be undesirable in practice.
>
> "It is my view that 'equal protection of the laws' presumes and political equity requires that population be treated as the basic and principal determinant for apportioning seats in a State legislature. However, it should be recognized that special conditions in some States may justify reasonable deviation from a strict population basis in the apportionment of one House of a bicameral legislature. Each State has an interest in insuring that its legislative body is constituted in such a way as to assure the various segments of the State's population an adequate voice in the legislative process.
>
> "I cannot subscribe to a principle which would deny to the people of any State the right, if a majority of the electorate so decides in a statewide election, to take into account relevant factors other than population in apportioning one House of their legislature.
> "It is important in a representative democracy such as ours that the States have the opportunity to experiment with reasonable proposals for insuring the

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[1] Apportionment of State Legislatures, Advisory Commission on Intergovernmental Relations, December, 1962.

[2] *Ibid.*, pages 75, 76.

> adequate representation of all segments of the population. A rigid interpretation of the Fourteenth Amendment setting up one, and only one, standard of representation would surely inhibit the future development of the democratic process, since there is no guarantee that what some may say is an appropriate apportionment formula today will be appropriate tomorrow. There is still much to be learned in the application of the theory of representative democracy, and our legal framework should be sufficiently flexible to permit the necessary experimentation for achieving representative democracy in practice."

Such statement is fully consistent with the views expressed in *Baker* v. *Carr*, 369 U. S. 186 (1962), that the Equal Protection clause has never been held to guarantee either mathematical identity or universal equality.[3]

In addition the statement of Congressman Fountain, *supra*, is judicially supported by the opinions of the three district court judges in this case (R. 294, 320, 323).

It is our view that the said opinions all indicate that the appellants here have failed to prove facts establishing the allegations of unconstitutionality set forth in the complaint. Under such circumstances appellants have not met their burden of showing invidious discrimination.

The "tests" for invidious discrimination are fully discussed and reviewed in the opinion of Judge Levet (R. 304-314). The findings in the two opinions below that

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[3] "Universal equality is not the test; there is room for weighting" (Id. at 245).

* * *

"No one * * * contends that mathematical equality among voters is required by the Equal Protection Clause." (Id. at 258)

* * *

"Moreover, there is no requirement that any plan have mathematical exactness in its application." (Id. at 260)

New York State's system of legislative apportionment is not irrational nor arbitrary (R. 305-307; 321) are supported by the particular facts herein. The conclusions (R. 314, 315) arrived at by the Court below are in accord with the evidence presented upon the trial. In our judgment the legislative apportionment of the New York State Legislature,[4] is not violative of the provisions of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, we submit that the three-judge court correctly determined the issues on the merits. We urge, therefore, that the judgment of the District Court dismissing the complaint on the merits be affirmed.

Respectfully submitted,

FRANCIS J. MORGAN,
County Attorney and
Attorney for Appellee,
Leonard Berman.

IRVING LIBENSON,
Senior Assistant County Attorney.

September 12, 1963.

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[4] New York State Constitution, Art. 3, Sections 2, 3, 4, 5. Approved by vote of the people. State Law, Sections 120-123.